EX PARTE OR LATE FILED ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	ET Docket No. 92-28[illegible]
Motorola Satellite Communications, Inc.	)	PP-32
	)	
Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band	)	
	)	
In the matters of	)	
	)	
Ellipsat Corp.; TRW Inc.; Constellation Communications, Inc.	)	FOIA Control Nos. 92-83 92-88, 92-86
	)	
On Request for Inspection of Records	)	

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

AMSC Subsidiary Corporation ("AMSC"), by its attorneys, hereby replies to the Opposition to Application for Review of Protective Order filed by Motorola Satellite Communications, Inc. ("MSCI") in the above-captioned proceeding.[1/]

MSCI's first substantive argument is that AMSC has not really been denied access to the materials subject to the Protective Order. MSCI makes light of AMSC's concerns that by reviewing the materials subject to the Protective Order it would hand MSCI on a

---

1/ MSCI contends that AMSC lacks standing to seek review of the OET's disposition of the FOIA requests filed by other applicants. AMSC has not sought review of the FOIA requests, but of the Commission's Protective Order, which restricted AMSC's access to documents on which the Commission intends to rely in processing a mutually exclusive application. AMSC's application for review is controlled by Section 1.115(a) of the Commission's Rules, which provides that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application for review. . . ." Moreover, since anyone can file a FOIA request at any time, it would be pointless to insist that AMSC file one before seeking review of the protective order.

silver platter a well trimmed prima facie trade secret appropriation action.[2/] MSCI contends that AMSC is adequately protected by a term of the Protective Order that provides that the restrictions on the use of information "shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person." Protective Order, ¶ 5. MSCI's argument completely ignores AMSC's fundamental point that it will be extremely difficult as a practical matter to defend against a trade secret theft claim even with a valid defense of independent development. This risk is real, not purely hypothetical. The shift in burden of proof -- a real injury -- occurs the moment AMSC reviews the material.

MSCI also contends that AMSC could review the materials with impunity simply by using an outside technical consultant. This conclusory statement by MSCI does nothing to refute AMSC's showing in the form of an affidavit of William Garner, AMSC's Chief Scientist, that there are no outside technical consultants available to work for AMSC who are qualified to review the MSCI materials for the purpose of preparing comments who are not also either already involved in technology development for AMSC or likely to be so involved in the future.

MSCI argues that AMSC is situated no differently from the other parties to the Protective Order, which accepted the conditional access provided by the order. While the private strategies of the other parties are not relevant to the legal merit of AMSC's

---

2/ AMSC's application for review pointed out that AMSC is required to acknowledge that the MSCI submission includes trade secrets and confidential information before even being allowed to review the materials; and that by so reviewing the putative "confidential" information, AMSC would have met the most critical elements of an appropriation action even if it engaged in no misconduct. As a practical matter, successful defense of an appropriation action under such circumstances is extremely difficult, since the burden of proof shifts to the defendant. Thus, review of MSCI's documents by AMSC pursuant to the Protective Order would force AMSC to accept an unreasonable risk.

claim, significant differences between AMSC and the other parties do exist. The most significant is that AMSC currently holds an FCC authorization for an MSS system, and is currently involved in the actual (as opposed to theoretical) development of its system. Thus, AMSC is in a unique position to understand and appreciate the risk it faces.

MSCI concedes that the Commission's ruling on the applicability of FOIA Exemption 4 to MSCI's submission must be within the agency's power, must be based on substantial evidence, and must be sufficiently clear and complete so that a reviewing court need not guess as to the agency's rationale. Dunkley Refrigerated Transport, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974). MSCI makes only a half-hearted argument that the record underlying the Protective Order meets this test,[3/] assuming favorable answers to essential inquiries that the Protective Order ignores, such as: Are MSCI's descriptions of the materials controlling of their legal status? Can determinations of FOIA protection be made on the sole basis of MSCI's own descriptions rather than on the basis of explicit findings on the record?[4/]

MSCI also argues briefly that the procedures employed in the ONA proceedings are not called for here. But MSCI fails to explain why the matter of exclusive rights to establish an LEO system at issue here is of any less import than Commission consideration of the Switching Cost Information Systems at issue in the ONA proceedings. Contrary to MSCI's implication, AMSC never has demanded a lengthy or

---

3/ Ultimately, MSCI all but concedes that the record underlying the order is deficient. MSCI Opposition, p. 11.

4/ At page 10, MSCI misrepresents AMSC's arguendo assumption that MSCI's submission included trade secrets by casting it as a concession that the materials constitute trade secrets. To this misrepresentation, MSCI bootstraps a primitive argument to the effect that "no record is necessary to support the OET's finding that the materials are confidential because even AMSC has conceded that the materials are confidential." The banality of this argument speaks for itself.

complex analysis of MSCI's materials; only a legally adequate one. Reference to the ONA proceedings was made to illustrate the procedural steps taken and the careful consideration given to requests for confidential treatment of materials in another case of wide ranging public import.

Beginning at page 11 of its opposition, reciting essentially the same tests for such treatment as those cited by AMSC, MSCI makes the conclusory claim that its submissions qualify for confidential treatment. MSCI then glibly asserts that its information meets the Board of Trade test because it is "confidential."[5/] Thus, MSCI again simply assumes the answer to one of the key issues. Having done so, MSCI asserts that confidential treatment of MSCI's submission is warranted under both the "competitive harm prong" and the "program effectiveness prong" of the test for voluntary disclosure adopted in National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Noting that the "competitive harm" prong requires showings that actual competition exists and that substantial competitive injury likely would result from disclosure, MSCI states that the contested nature of the proceeding demonstrates that competition exists, and that requiring it to disclose that information to its competitors would "cause [MSCI] substantial competitive harm." Nowhere does MSCI address the long line of FCC cases holding that when an applicant or licensee voluntarily places confidential information at issue in a contested proceeding in pursuit of a Commission grant, the information loses its protected status. See, e.g., Amaturo Group, Inc., 39 RR2d (1976). Whatever risk MSCI faces is a risk it voluntarily determined was worth the potential reward of a dispositive Pioneer's Preference to build an exclusive LEO system.

5/ Board of Trade v. Commodity Futures Trading Commission, 627 F.2d 392, 401 (D.C. Cir. 1980).

MSCI also contends that the "program effectiveness prong" is satisfied by its request, since (MSCI contends) potential applicants will not be forthcoming with information to support their Pioneer's Preference requests unless confidential treatment is provided. Of course, the Commission's experience utterly belies this point, since MSCI's request for confidential treatment was the first, following nearly 100 Pioneer's Preference requests that were filed without demands of confidentiality. The true risk to the Pioneer's Preference program effectiveness is that by granting MSCI's request for confidential treatment of voluntarily submitted materials, the Commission will become mired in similar requests, to the point that it will be adjudicating FOIA requests, issuing protective orders, and arbitrating trade secret infringement complaints, rather than making expeditious grants of authorizations for new, innovative services. If anything, encouraging Pioneer's Preference applicants to seek confidential treatment of their submissions will thwart the very purpose for which the program was adopted.

For the foregoing reasons, AMSC respectfully requests that the Protective Order be reversed, and that the Commission either return MSCI's materials without consideration or make them available without restriction.

Respectfully submitted,

AMSC SUBSIDIARY CORPORATION

Bruce D. Jacobs
Glenn S. Richards
John K. Hane
Fisher, Wayland, Cooper
& Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 659-3494

Lon C. Levin
Vice President and
Regulatory Counsel
AMSC Subsidiary Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-5858

Dated: July 9, 1992

CERTIFICATE OF SERVICE

I, Denise Sullivan, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, hereby certify that true copies of the foregoing "**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**" were sent this 9th day of July 1992, by first class United States mail, postage prepaid, to the following:

Robert A. Mazer
Albert Shuldiner
Nixon, Hargrave, Devans & Doyle
Suite 800
One Thomas Circle, N.W.
Washington, D.C. 20005

Jill Abeshouse Stern
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Linda K. Smith
Robert M. Halperin
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Leslie A. Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817

Norman P. Leventhal
Raul R. Rodriguez
Stephen D. Baruch
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006

Jeffrey L. Sheldon
General Counsel
Utilities Telecommunications Council
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

William K. Keane
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005

J. Geoffrey Bentley
Birch, Horton, Bittner & Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Veronica Haggert
Robert Frieden
Motorola, Inc.
1350 I Street, N.W.
Suite 400
Washington, D.C. 20005

Philip L. Malet
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

James G. Ennis
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Cheryl Lynn Schneider
Communications Satellite Corporation
950 L'Enfant Plaza, S.W.
Washington, D.C. 20024

J. Ellis McSparran, President
3S Navigation
23141 Plaza Pointe Drive
Laguna Hills, CA 92653

John L. Bartlett
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

M. Worstell
Vice President, Contracts
Litton Aero Products
6101 Condor Drive
Moorpark, CA 93021

Denise Sullivan
Denise Sullivan